UEM GENISYS SDN BHD

v.

SHIMIZU CORPORATION & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-685-2001]
7 APRIL 2003

CIVIL PROCEDURE: *Parties - Locus standi - Whether solicitors lawfully authorised to institute legal proceedings - Appointment of solicitors not authorised by Board of Directors - Whether rendered current civil suit a nullity*

EQUITY: *Defences - Estoppel - Whether defendants' solicitors were estopped from challenging the authority to appoint plaintiff's solicitors*

Two preliminary issues arose for determination in this instance. The first concerned the issue of *locus standi* and the other was in relation to the issue of estoppel which were whether: (i) one M/s Gideon Tan Razali Zaini ('GTRZ') was lawfully appointed and authorised by the plaintiff's company to institute this legal proceedings on its behalf; and whether (ii) the defendant's solicitors, one M/s Azman Davidson & Co. ('ADC') was estopped from challenging on behalf of its clients, the authority of one Seow to appoint and instruct solicitors on behalf of the plaintiff's company.

Held:

[1] The evidence showed that GTRZ was purportedly appointed by Seow to act on behalf of the plaintiff by a letter dated 23 July 2001. However, by virtue of a High Court order *vide* Civil Suit No. MT5-22-415-2001, Seow was not the CEO of the plaintiff after 17 June 2001. Thus, the purported appointment of GTRZ by Seow through his letter in his purported capacity as the CEO of the plaintiff was unlawful and invalid. Furthermore, there has not been a stay of the said order of the High Court and as such, that order must be obeyed. (p 426 d-h)

[2] In addition, the purported appointment of GTRZ by Seow was done without the consent or authorisation of the Board of Directors of the plaintiff's company. Therefore, the current civil suit was held to be a nullity. (p 430 a-c)

[3] Since ADC's role was advisory in nature and was also unrelated to the subject matter of the present civil suit, it was wrong to argue that the defendants' solicitors were estopped from challenging on behalf of its clients with regards to the authority of Seow to appoint and instruct GTRZ on behalf of the plaintiff's company.

[Ordered accordingly.]

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Canadian Metal Co Ltd v. Canadian Broadcasting Corpn (No 2) [1975] 48 DLR (3d) 641 ***(refd)***

Donald Campbell & Co Ltd v. Pollak [1927] AC 732 ***(refd)***

Grundt v. Great Boulder Pty Gold Mines Ltd [1937] 59 CLR 641 ***(refd)***

Howitt Transport v. Transport and General Workers' Union [1973] 1 CR 1 ***(refd)***

Lawrence Au Poh Weng & Anor v. Annie Tan Huay Lian [1972] 2 MLJ 124 ***(refd)***

Moorgate Mercantile Co Ltd v. Twitchings [1976] 1 QB 225 ***(refd)***

Spokes v. Banbury Board of Health [1865] LR 1 Eq 42 ***(refd)***

Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd [1990] 2 CLJ 297; [1990] 3 CLJ (Rep) 165 HC ***(refd)***

The Karting Club of Singapore v. David Mak & Ors [1992] 2 SLR 483 ***(refd)***

United Investment And Finance Ltd v. Tee Chin Yong & Ors [1967] 1 MLJ 31 ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal [1995] 3 MLJ 549 SC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 33(1)

Other source(s) referred to:

Gore-Browne on Companies, 43rd edn, para 26-3

For the plaintiff - Rizal Zulkeply; M/s Gideon Tan Razali Zaini
For the 1st & 2nd defendants - Lee Chin Peow; M/s Azman Davidson & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Abdul Malik Ishak J:

Preliminary issues

There were two preliminary issues for this court to decide. One was in relation to *locus standi* and the other on estoppel. In regard to *locus standi*, the question posed was framed and phrased in this way:

a Whether Messrs Gideon Tan Razali Zaini ("GTRZ)") have been duly and lawfully appointed and authorised by the plaintiff's company to institute this legal proceedings on its behalf?

While on estoppel, the question was crafted in this manner:

b Whether the defendant's solicitors (Messrs Azman Davidson & Co) are estopped from challenging on behalf of its clients, the authority of Mr. Seow Boon Cheng ("Seow") to appoint and instruct solicitors on behalf of the plaintiff's company by virtue of the fact that the defendants' solicitors had previously (in 1999/2000) rendered legal advice to the plaintiff's company in respect of a totally unrelated matter?

c

Straight To The Point – (a) Locus Standi

The plaintiff by the name of UEM Genisys Sdn Bhd is a private limited company with only two shareholders, namely:

(a) United Engineers (Malaysia) Berhad ("UEM"); and

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(b) Genisys Integrated Engineers Pte Ltd ("GIE").

Now, UEM is the majority shareholder and owns 51% of the shares in the plaintiff's company whilst GIE owns the remaining 49% of the shares. The four directors on the board of the plaintiff nominated by UEM and GIE

e respectively are as follows:

UEM nominee directors are:

(1) Sulaihah Maimunni; and

f (2) Mohd Zaki Hamdan.

While GIE nominee directors are and constituted two personalities, namely:

(1) Seow; and

g (2) S.T. Christina Rani a/p Sivapragasam.

The focus of attention would be Seow. It would be correct to say that Seow's authority to act as the Chief Executive Officer ("CEO") of the plaintiff had been challenged by UEM together with the UEM nominated directors of the plaintiff in the Shah Alam High Court vide civil suit no: MT5-22-415-2001.

h The learned judge of the Shah Alam High Court in his written judgment as seen in exh. "K23" of encl. 36 made the following findings of facts, which are quiet germane to the case at hand, and they may be stated as follows:

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(a) that Seow has no authority to act as CEO of the plaintiff – UEM Genisys Sdn Bhd ("UEMG"), after 17 June 2001; and

(b) that the purported appointment of a firm of solicitors by Seow on behalf of UEMG on the strength of the letter of appointment issued by Seow on 24 June 2001 was improper, unlawful and invalid.

The same learned judge of the Shah Alam High Court *vide* civil suit no: MT5-22-415-2001 by an order dated 4 February 2002 held, *inter alia*, as follows (as seen in exh. "K22" of encl. 36):

(1) GTRZ have not been lawfully authorised and appointed to act as solicitors of the defendant there (UEMG) in the civil suit.

(2) The Memorandum of Appearance and Defence filed therein be set aside.

(3) Costs to the plaintiff there (UEM) to be borne by GTRZ.

I am indeed fortunate that the learned counsel on both sides have been very helpful. Both the learned counsel informed me that there was an appeal to the Court of Appeal against the decision of the learned judge of the Shah Alam High Court but, of crucial importance was this: that there was no stay of the decision of the learned judge of the Shah Alam High Court. So, there must be obedience to the order that was handed down by the learned judge of the Shah Alam High Court (*Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal* [1995] 3 MLJ 549 SC). As Wood V.C. aptly said in *Spokes v. Banbury Board of Health* [1865] LR 1 Eq 42 at 48:

> … the simple and only view is that an order must be obeyed, that those who wish to get rid of that order must do so by the proper course, an appeal. So long as it exists, the order must be obeyed, and obeyed to the letter ... .

Sir John Donaldson explained further in the case of *Howitt Transport v. Transport and General Workers' Union* [1973] 1 CR 1 at 10:

> …. orders of any court must be complied with strictly in accordance with their terms. It is not sufficient by way of answer to an allegation that a court order has not been complied with for the person concerned to say that he 'did his best'. But if a court order requires a certain state of affairs to be achieved the only way in which the order can be complied with is by achieving that state of affairs.

O'Leary J in *Canadian Metal Co Ltd v. Canadian Broadcasting Corpn (No. 2)* [1975] 48 DLR (3d) 641 at 669 (Ont) nicely put it in these words:

> To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn …. If the remedies that the courts grant to correct …. wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result in the destruction of our society.

Concisely put, the order of the learned judge of the Shah Alam High Court must be obeyed to the letter. No doubt there was an appeal to the Court of Appeal but, as both learned counsel had said, there was no stay of execution. Moreover an appeal does not operate automatically as a stay of execution. It is trite law that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined or where there is an application for a stay and the unsuccessful party can show special circumstances to justify the stay. Here, there was no stay at all of the order of the learned judge of the Shah Alam High Court. So that order must be obeyed. There must be total obedience.

Returning back to the narration of the facts, there was evidence to show that GTRZ were purportedly appointed by Seow to act on behalf of the plaintiff by a letter dated 23 July 2001 which was issued by Seow in his purported capacity as the CEO of the plaintiff (see exh. "SBC23" of encl. 14). In defiance, Seow claimed that the appointment of GTRZ to act on behalf of the plaintiff was made in his capacity as the CEO of the plaintiff and purportedly in pursuant to a Discretionary Authority Limits (see paras. 3(g) and (h) of encl. 14 and exh. "SBC-22" thereto). But, of pertinence and indeed crucial to the appointment of GTRZ by Seow would be the order of the learned judge of the Shah Alam High Court. It must be recalled that the learned judge of the Shah Alam High Court had found as a matter of fact that Seow was no longer the CEO of the plaintiff after 17 June 2001. So the purported appointment of GTRZ by Seow through his letter dated 23 July 2001 in his purported capacity as the CEO of the plaintiff must be held unlawful and invalid.

Since there was no stay of the order of the learned judge of the Shah Alam High Court, his Lordship's decision that Seow had no authority to act as CEO of UEMG after 17 June 2001 would render whatever that Seow had done after that date to be null and void. Due respect and obedience must be given to the order of the learned judge of the Shah Alam High Court and so GTRZ was not lawfully appointed to act on behalf of the plaintiff and the institution of this civil suit on the instructions of Seow without the consent or authorisation of the Board of Directors of the plaintiff's company must be held to be invalid and unlawful. There are no two ways about it.

It must be borne in mind that the CEO's authority under the Authority Discretionary Limits to appoint external professionals did not extend to the commencement of legal proceedings in the plaintiff's name unless there was prior approval of the Board of Directors. At any rate, even as one of the directors of the plaintiff, Seow had no authority to appoint GTRZ and he too cannot instruct GTRZ to institute this civil suit in the name of the plaintiff. It must also be borne in mind that Seow represented the interest of the minority shareholders of the plaintiff. Seow's appointment of GTRZ and the subsequent institution of this civil suit in the name of the plaintiff were made without the consent or support of the majority shareholders of the plaintiff nor the directors of the plaintiff nominated by UEM. It must be emphasised that the appointment of GTRZ by Seow and the subsequent institution of this civil suit in the name of the plaintiff were not authorised by the Board of Directors of the plaintiff nor by the majority shareholders of the plaintiff.

It is the Board of Directors of a company that will manage the company. Put in another way, the management of the company lies with the Board of Directors. Of course, the powers of the company would be subject to the Articles of Association of the company and to the provisions of the Companies Act 1965 (Act 125) (Revised 1973) (hereinafter referred to as the "Companies Act 1965"). It is correct to say and I so say that by virtue of s. 33(1) of the Companies Act 1965 the Memorandum and the Articles of Association of the company constitute a contract between the company and its members and also among the members *inter se*. It is this contract that will contain the covenants on the part of each member to observe all the provisions of the Memorandum and the Articles of Association of the company. Now, in the context of the present case, I need to refer to art. 73 of the Articles of Association of UEMG – the plaintiff, and that article provides as follows:

POWERS AND DUTIES OF DIRECTORS

General powers of the company vested in Directors.

73. The business of the company shall be managed by the directors who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act, and to such regulations, being not inconsistent with the aforesaid regulation or provisions as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

This would be followed by art. 79 of the Articles of Association of UEMG – the plaintiff, which states that the business of the directors are to be regulated by a meeting of the directors and not by a director acting alone. For clarity, I will now reproduce art. 79:

PROCEEDINGS OF DIRECTORS

Meetings. 79. The directors may meet together for the despatch of business adjourned and otherwise regulate their meetings as they think fit. A director may at any time and the secretary shall on the requisition of a director summons a meeting of the directors by giving them not less than seven days notice thereof unless such requirement is waived by them.

Acting alone, a director cannot bind the company. Here, Seow seemed to have acted alone and there was no power specially delegated to him. There is a passage appearing in *Gore-Browne on Companies*, 43rd edn which merits reproduction. There, at para. 26-3, the learned author wrote:

> Each director has not alone power to bind the company unless he has had this power specially delegated to him. Nor can a number of the directors, even although they constitute a majority, act without meeting or at a meeting of which notice has not been given to the whole body, and acts done by the majority of board not duly convened as a board meeting (eg on the occasion of a general meeting of the company) are not valid.

Here, a challenge was mounted as to the validity of the appointment of GTRZ by Seow. A challenge was also mounted as to their authority to act on behalf of the plaintiff – UEMG. Sadly, neither GTRZ nor Seow, in particular, have been able to produce a resolution of the Board of Directors of the plaintiff authorising the appointment of GTRZ by Seow and the institution of this civil suit in the plaintiff's name. And so the burden of proving that this civil suit had been instituted by GTRZ with proper authority rests on the plaintiff's company. Echoing the same sentiments, this was what VC George J (as he then was) said in *Syawal Enterprise Sdn. Bhd. & Anor. v. Dayadiri Sdn. Bhd.* [1990] 2 CLJ 297 at p. 298; [1990] 3 CLJ (Rep) 165 at p. 167:

> The lack of authority of the solicitors to act can be challenged at any stage of the proceedings – see *Simmons v. Liberal Opinion Ltd* [1911] 1 KB 966 followed in *Re L.Y. Swee & Co. Ltd* [1968] 2 MLJ 104 at 107 and in *Chin Kok Kwong Const. Sdn. Bhd. v. Sunrise Towers Sdn. Bhd.* [1986] 2 MLJ 41 at 42. The challenge having been made the burden of proving that the suit had been instituted with proper authority rests on the plaintiff company. See *United Investment & Finance Ltd v. Tee Chin Yong & Ors* [1967] 1 MLJ 31 at 35.

Proceeding further and at p. 169, VC George J (as he then was) aptly said:

> There has been a failure to prove that Soo Seng Chin had the authority to instruct solicitors to institute the suit. The effect is to make the proceedings a nullity in the sense that the action is not properly constituted. See *Danish Mercantile Co. Ltd. v. Beaumont* [1951] 1 Ch. 680, 687.
>
> That same case is also authority for the proposition that the act of the solicitors causing the writ to issue without proper authority can be ratified by the plaintiff company. Ratification however must be effected within a reasonable time – see *Boustead on Agency*, 14th Ed. r. 2(c) at page 51.

Likewise here, the current civil suit must be held to be a nullity since it flows from the lack of authority on the part of Seow to appoint and instruct GTRZ to institute the present proceedings. In my judgment, the present civil suit was not "properly constituted" using the words of VC George J (as he then was) in *Syawal Enterprise (supra)*. But all is not lost. Ratification can be done and it is up to the plaintiff – UEMG, to act expeditiously and within reasonable time. What is reasonable time would vary from case to case.

It is also ideal to refer to the case of *United Investment And Finance Ltd. v. Tee Chin Yong & Ors* [1967] 1 MLJ 31, a case that was relied upon by VC George J (as he then was) in *Syawal Enterprise (supra)*. In that case, Chua J spoke of the burden of proof in this way (see p. 35 of the report):

> The burden of proving that Wong Hieng Tock had the power and authority to institute these actions rested on the plaintiff company, as his mere appointment as managing director conferred no such power and authority upon him. I am clearly of the opinion that they have not discharged that burden. There is no evidence that the directors had vested in Wong Hieng Tock their power to institute or defend actions on behalf of the company. In my view he was not clothed with such power and authority.

In regard as to who should pay costs, Chua J had this to say in that case (see p. 36 of the report):

> It would appear from the authorities that if the defendants had questioned the authority to sue by way of motion to strike out the name of the company as plaintiffs or to stay or dismiss these actions the defendants could have in the same motion asked for costs against Wong Hieng Tock, who was the person who commenced these unauthorised actions, and against the solicitors who act for the company without authority of the company and the court could have ordered them to pay the costs.

However, I am of the view that I have the discretion whether to order Seow or GTRZ to pay the costs for instituting the present proceedings for the plaintiff without authority. It is trite law that the costs of and incidental to all court proceedings shall be at the discretion of the court and the court shall have the full power to determine and identify by whom and to what extent the costs are to be paid (*The Karting Club of Singapore v. David Mak & Ors* [1992] 2 SLR 483; and *Lawrence Au Poh Weng & Anor v. Annie Tan Huay Lian* [1972] 2 MLJ 124). Of course, the discretion must be exercised judicially and the court ought not to exercise it against a successful party (*Donald Campbell & Co. Ltd. v. Pollak* [1927] AC 732 at 811). So, it can be surmised that the purported appointment of GTRZ by Seow and the institution of this present civil suit on the instructions of Seow were done without the consent or authorisation of the Board of Directors of the plaintiff's company and the result would be this. The current civil suit must be held to be a nullity. This was my judgment and I so hold accordingly.

(b) Estoppel

It was said that Messrs Azman Davidson & Co ("ADC"), the present solicitors for the defendant, were previously engaged by the plaintiff in 1999/2000 to advise on and in regard to a consultancy agreement between the plaintiff and Berkeley Consulting Sdn Bhd. It was said that the last correspondence pertaining to this retainer was in the year 2000 – to be precise on 19 April 2000. It was also said that the services rendered by ADC were completely advisory in nature and that ADC were not appointed to act as solicitors for the plaintiff in any legal proceedings. So it can be surmised that since ADC's role was advisory in nature and was also unrelated to the subject matter of the present civil suit, it was wrong to argue as the plaintiff had argued that the defendants' solicitors are estopped from challenging on behalf of its clients in regard to the authority of Seow to appoint GTRZ and to instruct the latter accordingly on behalf of the plaintiff's company. In my judgment, the doctrine of estoppel cannot apply to the defendants at all. There was no room for the operation of the doctrine of estoppel to be invoked against the defendants. The facts simply do not permit this. At any rate, it would be pertinent to point out that there was no dispute as regards the authority of Seow during the period between 1999 and April 2000 and this was the very period when ADC were engaged by the plaintiff to advise on the consultancy agreement which was entirely an unrelated matter.

I will now refer to three authorities on estoppel.

In *Grundt v. Great Boulder Pty Gold Mines Ltd* [1937] 59 CLR 641 at pp. 657 and 677, Dixon J observed:

> Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it. But the law does not leave such a question of fairness or justice at large. It defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice to preclude the party if the other requirements for an estoppel are satisfied.

But in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, the Federal Court held that the element of detriment was not part and parcel of the doctrine of estoppel and that it was not necessary when invoking the doctrine to prove that one party relied upon his opponent's conduct and in consequence thereto had acted to his detriment.

Lord Denning laid down the "general principles of estoppel" in the case of *Moorgate Mercantile Co Ltd v. Twitchings* [1976] 1 QB 225 at 241, in these salient words:

> Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.

Justice and equity must come into play for the defendants. It would certainly be unjust and inequitable to hold that the doctrine of estoppel can be invoked against the defendants. The advisory role of ADC in that consultancy agreement was unrelated to the factual matrix of the present case. ADC did not act as solicitors for the plaintiff and ADC did not file any suit on behalf of the plaintiff against anyone or against any company. Seow, on the other hand, had gone overboard when he purportedly appointed GTRZ and he too was instrumental in the filing of the present proceedings against the defendants without any legal authority.

Conclusion

I have attentively heard the submissions of the learned counsel on both sides. I would, with respect, agree with the submissions of Mr. Lee Chin Peow, the learned counsel for the defendants, and, consequently, I make the following orders:

(1) that the writ and the statement of claim as reflected in enclosure one (1) filed by GTRZ purportedly on behalf of the plaintiff be struck out;

(2) that, accordingly, prayer one (1) of encl. 26 is allowed;

(3) that encl. 4 should be dismissed with costs;

(4) that the costs of this whole action be borne by Seow;

(5) that the undertaking of the defendants in the order dated 18 September 2001 that is as per encl. 27 be discharged; and

(6) that the damages suffered by the defendants as a result of or pursuant to the wrongful institution of this action and the order obtained on 18 September 2001 as per encl. 27 be assessed by the senior assistant registrar and paid forthwith by Seow to the defendants.

Addendum

I must mention that as per encl. 27 which was the order of this court dated 18 September 2001 – wherein the defendants were directed to deposit a sum of RM11,165,118.75 into the Bank of Tokyo-Mitsubishi (M) Bhd, it had been fully complied with by the defendants. That would constitute complete and wholesome obedience to an order of this court. Since Seow had no authority to appoint GTRZ and that whatever he did after 17 June 2001 must be held to be null and void, then it would only be fair to discharge that undertaking as seen in encl. 27 and which undertaking had, at any rate, been complied with by the defendants to the letter.